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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

MICHAEL HIRANO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITIONER'S REPLY BRIEF

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The government agrees that there is indeed a split in the circuits concerning whether the "intent to defraud" is an essential element of 18 U.S.C. § 921. The government nonetheless argues that any dispute is "largely semantic." Opp. 8.[1] That is not so. The Fifth Circuit has made clear that an indictment charging a violation of Section 912 must allege, and the government must prove, that the defendant acted with the intent to defraud. See *United States* v. *Pollard*, 486 F.2d 190, 191 (5th Cir. 1973); *United States* v. *Randolph*, 460 F.2d 367, 369-70 (5th

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[1] Respondent notes that although addressed by the district court, this issue was not considered by the court of appeals. Opp. 6. However, this Court has held that "pure issue(s) of law" presented in petition may be appropriate for decision even though not addressed by the lower court. *Nixon* v. *Fitzgerald*, 457 U.S. 731, 743 n.23 (1982); *see also Mitchell* v. *Forsyth*, 472 U.S. 511 (1985).

Cir. 1972); *Honea* v. *United States*, 344 F.2d 798, 801-04 (5th Cir. 1965). The Fifth Circuit imposes this requirement in order to protect the defendant against prosecution for harmless acts. Other circuits have held that an intent to defraud is not an element of the offense. This is not mere semantics but a crucial difference in the nature and scope of what the goverment must prove to establish a false personation offense. Any differences in interpretation among the circuits should be resolved by this Court to avoid the possibility that criminal culpability will turn more on geography than it will on the uniform application of federal law.

The government attempts to disparage the stark conflict among the circuits by arguing that the Fifth Circuit has not recently addressed the issue. Opp. 9. But, the law in the Fifth Circuit is well established, and there is no basis to believe that the Fifth Circuit would change its position today. The panel opinions at issue are the law of the Fifth Circuit until "en banc reconsideration or a superseding contrary decision of the Supreme Court." *Matter of Dyke*, 943 F.2d 1435, 1442 (5th Cir. 1991); see also *Pruitt* v. *Levi Strauss & Co.*, 932 F.2d 458, 465 (5th Cir. 1991); *In re Fox*, 902 F.2d 411, 413 (5th Cir. 1990). Moreover, this Court consistently has granted certiorari based on the conflict involved and not the age of the conflicting cases. See, e.g., *Alamo Land & Cattle Co.* v. *Arizona*, 424 U.S. 295, 300 (1976) (decision in conflict was nearly eighteen years old); *Commissioner* v. *Stidger*, 386 U.S. 287, 289 (1967) (conflicting decision was eighteen years old); *Bulova Watch Co.* v. *United States*, 365 U.S. 753, 754 n.1 (1961) (opinion in conflict was issued over twenty years earlier).

The government emphasizes the fact that "eight other circuits have concluded that 'intent to defraud' is not required to be specifically pleaded." Opp. 7.[2] Of course,

[2] The Fifth Circuit may not stand alone in requiring the intent to defraud. The Tenth Circuit has suggested that it would adopt a similar reading of the statute. *See Dickson* v. *United States*,

the fact that these circuits have aligned themselves may indicate nothing more than a shared but nonetheless mistaken approach. This Court has overruled the prevailing, not to mention unanimous, interpretation among the courts of appeals in the past. See, e.g., *McNally* v. *United States*, 483 U.S. 350, 358 (1987) (overruling "each of the Courts of Appeals that has addressed the issue"); see also *Central Bank* v. *First Interstate Bank*, 114 S. Ct. 1439, 1456 n.1 (1994) (Stevens, J., dissenting); *Shearson/American Express, Inc.* v. *McMahon*, 482 U.S. 220, 225 (1987).

The government also notes that certiorari has twice been denied on the issue of whether intent to defraud is an essential element of a section 912 prosecution, see *United States* v. *Gayle*, 967 F.2d 483 (11th Cir. 1992) (en banc), *cert. denied*, 113 S. Ct. 1402 (1993); *United States* v. *Wilkes*, 732 F.2d 1154 (3d Cir.), *cert. denied*, 469 U.S. 964 (1984), and that "[s]ince that time, there has been no development warranting a different result in this case." Opp. 9. It is of course well settled that a "denial of certiorari imports no implication or inference concerning the Court's view of the merits." *Hughes Tool Co.* v. *Trans World Airlines*, 409 U.S. 363, 366 n.1 (1973); see also *Darr* v. *Burford*, 339 U.S. 200, 226 (1950) (Frankfurter, J., dissenting) (denial of certiorari means nothing more than that "this Court has refused to take the case"); *United States* v. *Carver*, 260 U.S. 482, 490 (1923). Moreover, the conflict in the circuits has continued to persist since the Court denied review of the issue. It is now clear that this Court's review is necessary to bring uniformity to the law.

2. Respondent claims that this Court should not hear petitioner's duplicity claims because they were not preserved. In general, certiorari will not be granted where

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182 F.2d 131, 132 (10th Cir. 1950) ("[t]here must be the false representation of being an officer with intent to defraud, and some overt act in keeping with the false pretense").

"the question presented was not pressed or passed upon below." *United States* v. *Williams*, 112 S. Ct. 1735, 1738 (1992). Petitioner in fact raised this duplicity claim in the courts below, but the court of appeals declined "to reconsider the propriety of the district court's judgment as to these issues in this appeal." Pet. App. 3a n.1.[3] Thus, the claim has been preserved for this Court's review, and the court of appeals' failure to consider the claim does not foreclose this Court's review. Moreover, the legal issues involved are clear and well developed, and there is therefore no practical obstacle that would prevent an informed decision on the question by this Court.

All of circuit courts reaching this issue agree that an indictment that combines the two offenses of Section 912 into one count is duplicitous. See *United States* v. *Kimberlin*, 781 F.2d 1247, 1250 (7th Cir. 1985), *cert. denied*, 479 U.S. 938 (1986); *United States* v. *Aguilar*, 756 F.2d 1418, 1420 (9th Cir. 1985); *United States* v. *Leggett*, 312 F.2d 566, 568-69 (4th Cir. 1962). Petitioner's claim focuses not on the existence of the duplicity, but rather on the conflict that arises as to the practical effect of such a flaw in the indictment. On this issue, the Seventh Circuit parts company with the court below, as well as other circuits, and has indicated that such "duplicity . . . is of a technical semantic nature." *Kimberlin*, 781 F.2d at 1251. The question is whether the standard for determining whether an indictment is duplicitous may be set aside where the crime is false personation of a federal officer. That cannot be the law, and this Court should grant review to make that clear.

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[3] Although the Fourth Circuit was under the mistaken impression that it had decided the duplicity issue when it affirmed the district court's denial of petitioner's section 2255 motion to vacate, petitioner again raised the duplicity claim when he appealed his conviction to the court of appeals. Pet. App. 3a n.1.

CONCLUSION

For the reasons set forth above and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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